IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PHILIP RAY WORKMAN,
Plaintiff,

V.

DON SUNDQUIST, Governor of the State of Tennessee; PAUL SUMMERS, Attorney General for the State of Tennessee, DONAL CAMPBELL, Commissioner of the Tennessee Department of Corrections; and RICKY BELL, Warden of Riverbend Maximum Security Institution; in their official capacities,
Defendants.

3 01 0295

Civil No._____
JURY DEMAND
JUDGE CAMPBELL
DEATH PENALTY CASE
Execution set for 1 a.m. on March 30, 2001

MEMORANDUM IN SUPPORT FOR MOTION FOR
TEMPORARY RESTRAINING ORDER

I. INTRODUCTION.

Philip Workman is scheduled for execution at 1 a.m. on March 30, 2001. On January 22, 2001, the Inter-American Commission on Human Rights [hereinafter IACHR] opened a case on Mr. Workman's behalf to examine whether his conviction and sentence constitute a violation of human rights. That same day, the IACHR sent a letter to the United States Department of State requesting that "all necessary measures [be taken] to preserve Mr. Workman's life and physical integrity" so that the IACHR could review his case. (Attached letter from IACHR.)

Mr. Workman is now asking this Court to grant a temporary restraining order to allow the IACHR sufficient time to review Mr. Workman's case on the grounds that executing Mr. Workman without allowing him to exhaust all of his remedies in the Inter-American system would violate his

federal and state constitutional rights to due process and procedural fairness as guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Tennessee Constitution; the open courts provision found in Article I, § 17 of the Tennessee Constitution; the Supremacy Clause of the United States Constitution, Article VI, clause 2, the Charter of the Organization of American States; and customary international law.

II. SUMMARY OF FACTS.

Mr. Workman petitioned the IACHR in April 2000 asking the IACHR to review his case for human rights violations and requesting that the IACHR request precautionary measures from the United States government so that his case could be properly reviewed in the Inter-American system. (See attached petition to IACHR and accompanying letter dated January 22, 2001.) Following the United States Court of Appeals for the Sixth Circuit grant of an en banc hearing, the case was held in abeyance at the IACHR. On January 17, 2001, Jae W. Jo, a student attorney at the International Human Rights Clinic at the Washington College of Law and Mr. Workman's counsel before the IACHR, contacted the IACHR to inform them that all of Mr. Workman's domestic remedies had been exhausted and the case was ripe for review by the IACHR. On January 22, 2001, the IACHR officially opened Mr. Workman's case for review and issued a request for precautionary measures to the United States' government. (Attached letter dated January 22, 2001) The IACHR specifically requested that **"the United States of America take all necessary measures to preserve Mr. Workman's life and physical integrity so as not to hinder the processing of his case before the Inter-American system."** Id. (emphasis added). Yesterday, March 28, 2001, the IACHR reiterated its request **"that precautionary measures be adopted to avoid irreparable harm to Mr.**

Workman's life until the Commission decides upon the claim filed on his behalf." (Letter dated March 28, 2001)

The IACHR was established in 1960 as an autonomous entity of the Organization of American States (OAS). Thomas Buergental, International Human Rights in a Nutshell 181 (2d ed. 1995). The OAS is a regional, inter-governmental organization with 35 member states, including the United States of America. Id. at 174. The IACHR's principal function is "to promote the observance and protection of human rights" within the Inter-American system. Id. at 182 (quoting Article 9 of the Statute creating the IACHR). As an OAS Charter organ, the IACHR has "constitutional legitimacy," id. at 179, and is entitled to receive and act upon individual petitions charging OAS member states with human rights violations. Id. at 182. The United States of America has signed and ratified the OAS Charter, April 30, 1948, 2 U.S.T. 2394, as well as the Protocol of Buenos Aires that established the IACHR as an OAS Charter organ. Feb. 27, 1970, 21 U.S.T. 607.

III. LAW AND ARGUMENT.

When ruling on a motion for a preliminary injunction, a district court must consider and balance four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; (4) how the public interest would be affected by the issuance of the injunction. Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross & Blue Shield Assoc., 110 F.3d 318, 322 (6th Cir. 1997). Because each of these factors counsel that this Court should enjoin the defendants from carrying out Philip Workman's execution while his case

is pending in the Inter-American system of human rights, this Court should enjoin them from doing so.

A. STRONG LIKLIHOOD ON THE MERITS

Executing Mr. Workman without allowing him to exhaust all of his remedies in the Inter-American system would violate his federal and state constitutional rights to due process and procedural fairness as guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Tennessee Constitution; the open courts provision found in Article I, § 17 of the Tennessee Constitution; the Supremacy Clause of the United States Constitution, Article VI, clause 2; the Charter of the Organization of American States; and customary international law.

1. Mr. Workman's Right to Resolution of his Petition Before the Inter-American Commission Is Guaranteed by Due Process and Procedural Fairness.

A recent decision of the British Privy Council provides support for the notion that Mr. Workman's execution must be prevented pending the resolution of his petition before the IACHR. In Lewis v. Attorney General of Jamaica, Privy Council Appeal Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (British Commonwealth Privy Council Sept. 12, 2000)(available at http://www.privy-coucil.org.uk/judicial-committee/2000/judgments) (copy attached), an appeal of four condemned men on Jamaica's death row, the Privy Council held that carrying out the death sentences of individuals with cases pending before the IACHR would be contrary to Jamaica's obligations in the Inter-American system of human rights. The Privy Council held that persons with cases pending before the IACHR are entitled to have those petitions considered by the IACHR–even though Jamaica had not incorporated the provisions of the American Convention on Human Rights into domestic law. Id.

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A. STRONG LIKELIHOOD ON THE MERITS

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The IACHR has jurisdiction to issue advisory opinions "regarding the interpretation of the [American] Convention [on Human Rights][hereinafter American Convention] or other treaties concerning the protection of human rights in the American States." American Convention, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Riec. OEA/Ser. L./V./II.23/Doc. 21 Rev. 6.[2] "Advisory Opinions [of the IACHR] are not academic exercises; they are judicial pronouncements. The mere fact therefore that the [IACHR] has made a pronouncement in an advisory opinion rather than in a contentious case does not diminish the legitimacy or authoritative character of the legal principle enunciated by it." Thomas Buergental, International Human Rights in a Nutshell 220 (2d ed. 1995).

Precautionary measures are the legal manifestation of the assurances to the rights accorded in the OAS Charter, to which the United States is a party. In this regard, the United States government has recognized the very competence of the OAS as member State, giving national recognition of the OAS's competence to carry out its roles as enumerated in its Charter. By committing the United States to its membership, the executive and legislative branches have effectively endorsed the OAS's mission to perform its designated function, one of them being the power of the IACHR to request precautionary measures made at the behest of individuals such as Mr. Workman. This joint endorsement by the other branches of government should give courts further cause to recognize requests for precautionary measures made by the IACHR. It recognizes the competence of the OAS and its IACHR organ to make such requests on the behalf of petitioners such as Mr. Workman. Mr. Workman seeks the fullest measure of due process afforded not only

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[2]The American Convention was signed by the President of the United States on June 1, 1977.

under the Constitutions of the United States and Tennessee, but under international law, and moreover, under the United States' obligations as a member of the OAS and its instruments.

These factors alone should give courts sufficient reason to recognize precautionary measures as the judicial act of a sovereign body and international tribunal, and grant them full faith and credit. These measures in no way seek to subvert the sovereignty of the United States, Tennessee and their courts. It is important to note that the granting of precautionary measures will not be the equivalent of a foreign judicial opinion inserting itself into domestic law to have superseding effect. It requests a stay of an execution; it does not ask for the reversal of the murder conviction. The guiding goal of any court should not be the expedient employment of punishment merely for expediency's sake, but the zealous protection of the rights guaranteed under law.

2. Mr. Workman's Right to Pursue Any and All Remedies Available to Him in the Inter-American System of Human Rights Is Guaranteed by the Open Courts Provision of the Tennessee Constitution.

The Open Courts provision of the Tennessee Constitution, Article I, § 17 states: "That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." This Constitutional provision directs the Courts of Tennessee to rule broadly in favor of protecting the citizens' right to have his/her day in court. See Presson v. Lockhart, 8 Tenn.(Higgins) 283 (Tenn. Civ. App. 1918). Therefore, Mr. Workman is entitled under the Tennessee Constitution to have his day before the IACHR and pursue the remedies afforded in the Inter-American system.

3. The Inter-American Commission's Request for Precautionary Measures to Stay Mr. Workman's Execution Constitutes an Act of State to Be Given Recognition in U.S. Courts.

The federal laws and judicial precedents of the United States give compelling weight to the notion that a decision from an international organization such as the Organization of American States to grant precautionary measures should be recognized as an act of a sovereign State in the courts of the United States. As such, the precautionary measures requested by the OAS's IACHR to stay the execution of Mr. Workman in essence carries the sovereign character of an act by a sovereign State, which should be recognized and respected by the courts of the United States. In this case, no compelling reason exists to believe the contrary, since the precautionary measures requested by the IACHR to the United States government to stay Mr. Workman's execution does not have the legal effect of overturning his murder conviction and the state's prescribed death sentence. It asks only for a stay of the execution until it can fully hear the petitioner's case and in no way prejudices the laws and sovereignty of the United States and Tennessee.

The federal laws and courts of the United States recognize the sovereign character of international organizations in several ways. The International Organization Immunities Act, 22 U.S.C. §288 (hereinafter "IOIA") establishes into federal law the sovereign character of international organizations such as the Organization of American States and the United Nations, which through the Act enjoy many of the rights and immunities that sovereign States have long possessed under the federal law of sovereign immunity. Presidential executive order number 10533 specifically recognized the OAS as one the organizations to enjoy the rights and immunities that the Act confers.

Construed more narrowly, this notion of sovereign immunity for international organizations is recognized by the federal courts whether it is examined under the rubric of absolute or restrictive immunity as codified in the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"). 28 U.S.C. §1330. The FSIA codified into federal law the theory of sovereign immunity, but cabined

it to a "restrictive" theory. Under this theory, a State will have broad immunities when acting in its *public capacity*, but will be liable as any private individual if it acts in a commercial capacity causing direct effect in the United States. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

With respect to the OAS, the court in Broadbent v. Organization of American States did not question whether the OAS enjoyed restrictive or absolute immunity from a suit filed by former employees for wrongful termination, but concluded simply that sufficient immunity existed to shield them from lawsuits based on acts committed in the United States. 628 F.2d 27 (D.C. Cir. 1980). However, the court in Mukaddam v. Permanent Mission of Saudi Arabia applied the restrictive theory under the FSIA and denied the defendant's motion to dismiss a wrongful discharge suit brought by an employee, concluding that the defendant's employment of the plaintiff constituted a commercial activity beyond the immunities granted under the FSIA. 111 F. Supp. 2d 457 (S.D.N.Y. 2000).

The important principle to be gleaned from Broadbent and Mukaddam is that both these cases give recognition to the notion that international organizations enjoy sovereign immunities in tandem with that of sovereign States under federal law. In this regard, when the OAS through its IACHR organ makes a request for precautionary measures on behalf of a petitioner, it is acting within the full competence of its public scope as clearly articulated in its Charter and therefore enjoys the immunities of an independent sovereign.

In Banco National de Cuba v. Sabbatino,376 U.S. 398, 416 (1964), the Court held that the expropriation by Cuba of sugar owned by U.S. nationals was a valid act of state and therefore unreviewable before the Supreme Court. Sabbatino used act of state not as a rule of public

international law, but treated it as a rule of constitutional law derived from the principle of separation of powers, stating that "the doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations. . . ." 376 U.S. 398, 423.

This constitutional foundation still remains in the application of the act of state doctrine for the judiciary not to interfere with acts within the scope of executive power. This constitutional foundation also underlies the Full Faith and Credit Clause, which requires states to give equal weight and measure to the judicial proceedings of other states. U.S. Const. art. IV, §1. While Full Faith and Credit is generally measured to domestic decisions, it applies as well to the decisions of foreign courts and tribunals as an act of state. The Restatements on the Foreign Relations Law of the United States articulates this in § 481(1):

> [A] final judgment of a court of a foreign state granting or denying recovery of a sum of money, *establishing or confirming the status of a person*, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States. [emphasis added].

The rationale underlying the Full Faith and Credit Clause of the United States Constitution has led courts in the United States, in general, to enforce judgments rendered in foreign states. Ritchie v. McMullen, 159 U.S. 235 (1895).

The only matter that would indeed block the recognition of a foreign judgment in the United States courts is a lack of regard for due process or lack of jurisdiction by the foreign tribunal. Restatement of the Law, Third, Foreign Relations Law of the United States, § 482.

In this regard, the precautionary measures requested by the IACHR should be granted full faith and credit in the United States courts. Indeed, the purpose of the precautionary measures is to ensure these very due process rights of the petitioner, and to guarantee those rights can be exercised to the fullest extent possible.

B. IRREPARABLE HARM

If this Court does not enjoin the defendants from executing Philip Workman, he will die without having the opportunity to avail himself of his rights before the Inter-American system of human rights. Thus, Mr. Workman would suffer irreparable harm if this Court does not enjoin the defendants from executing him until the Inter-American system of human rights has had a full opportunity to investigate and process his case.

C. HARM TO OTHERS/PUBLIC INTEREST

Preventing the defendants from carrying out Philip Workman's execution until the Inter-American system has had the opportunity to investigate and process his case harms no one, but allows justice to be served. The public interest is also served in allowing Philip Workman the full range of his due process and other constitutional rights. In protecting his due process rights, this Court will also be ensuring that members of the public will have their rights under the Inter-American system of human rights protected as well.

IV. CONCLUSION

Each factor this Court considers in determining whether to enjoin the defendants from carrying out Philip Workman's execution until he has had the opportunity to exhaust his remedies

in the Inter-American system of human rights weighs in Mr. Workman's favor. Therefore, for the above stated reasons, Philip Workman asks this Court to grant a temporary restraining order of his execution until he has had a chance to exhaust his remedies in the Inter-American system.

Respectfully submitted,

Donald E. Dawson
Counsel for Mr. Workman

Marjorie A. Bristol
Counsel for Mr. Workman

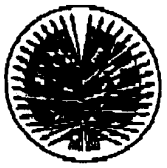
Office of the Post-Conviction Defender
530 Church Street, Suite 600
Nashville, TN 37243
615-741-9331
615-741-9430 fax

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing order was served via hand delivery on this 29th day of March, 2001 to Attorney General Paul G. Summers, 425 Fifth Ave. N., 2nd Floor, Nashville, TN 37243.

Marjorie A. Bristol

INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISION INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINE DES DROITS DE L'HOMME



ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 U.S.A.

March 28, 2001

Re: Case N° 12.261 – Philip Ray Workman
United States of America

Dear Mr. Jo and Ms. Nicole Birch:

In the name of the Inter-American Commission on Human Rights, I wish to acknowledge receipt of your communication of March 27, 2001, by which you provide additional information on the case cited above.

I also wish to inform you that, by note of today's date, the Commission transmitted the pertinent parts of your communication to the State, and, given the information contained therein, addressed the Government of the United States in the following terms:

> In light of the circumstances of Mr. Workman's scheduled execution this Friday, March 30, 2001, the Commission hereby respectfully reiterates its request to Your Excellency's Government that precautionary measures be adopted to avoid irreparable harm to Mr. Workman's life until the Commission decides upon the claim filed on his behalf.

Sincerely yours,

Jorge E. Taiana
Executive Secretary

Jae W. Jo and Nicole Birch
The American University
Washington College of Law
International Human Rights Clinic
4801 Massachusetts Ave., NW
Washington, D.C. 20016-8184

cc: Marjorie Bristol
Office of the Post Conviction Defender
State of Tennessee

INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISION INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINE DES DROITS DE L'HOMME

ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 U.S.A.

January 22, 2001

Re: Case N° 12.261 – Philip Ray Workman
United States of America

Dear Professor Wilson and Mr. Jo:

Further to the communication of the Inter-American Commission on Human Rights to the International Human Rights Law Clinic dated April 4, 2000, I wish to acknowledge receipt of the recent communication of January 17, 2001 from Jae W. Jo, with regard to the situation of Philip Ray Workman in the United States.

The Inter-American Commission on Human Rights, in a note of today's date, has advised the Government of that country of the situation set forth in your communication and has requested information with regard to the same. As soon as we receive a response from the Government, we will send you the pertinent parts of that reply for your comments.

The Commission has also requested, pursuant to Article 29(2) of its Regulations, that the United States of America take all necessary measures to preserve Mr. Workman's life and physical integrity so as not to hinder the processing of his case before the Inter-American system. This request was made on the basis that, if Mr. Workman was to be executed before the Commission has an opportunity to examine his case, any eventual decision would be rendered moot in respect of the efficacy of potential remedies, and irreparable harm would be caused to Mr. Workman.

International Human Rights Law Clinic
Att.: Professor Richard Wilson and Jae W. Jo
Washington College of Law
The American University
4801 Massachusetts Ave., NW
Washington, D.C. 20016-8184

The fact finding process may take some time, however we will inform you opportunely of any new developments. In the meantime, any additional information that you might receive should be forwarded to the Commission making reference to the name of the victim and the number of the case as noted above.

Sincerely yours,

Jorge E. Taiana
Executive Secretary

AMERICAN UNIVERSITY
WASHINGTON DC

CLINICAL PROGRAM

April 3, 2000

Emb. Jorge E. Taiana
Executive Secretary
Inter-American Commission on Human Rights
1889 F Street, NW
Washington, DC 20006

Re: Philip Ray Workman, Tennessee, U.S.A.—Petitioner

Request for Precautionary Measures and Submission of Petition

Dear Mr. Taiana:

We write as co-counsel on behalf of Mr. Philip Ray Workman, who is scheduled to be executed in Tennessee at 1:00 a.m. on Thursday, April 6, 2000. As counsel for Mr. Workman, we seek precautionary measures and intervention by the Commission because Mr. Workman has exhausted all domestic remedies.

The claims presented by Mr. Workman's case are as follows:

1. Denial of the right to a fair trial and the right to due process of law. The United States and Tennessee Governments have violated Mr. Workman's right to a fair trial, Article XVIII, and his right to due process of law, Article XXVI, of the American Declaration by denying Mr. Workman a fair hearing where he could present exculpatory evidence which would prove his innocence.
2. Denial of the right to life, Article I of the American Declaration, and violation of Article 4(3) of the American Convention on Human Rights. Tennessee has *de facto* abolished the death penalty as a result of its failure to execute anyone for 40 years. Executing Mr. Workman would violate the object and purpose of the American Convention whose Article 4(3) prohibits the reestablishment of the death penalty by states which have abolished it.

The Governor of Tennessee may still stay Mr. Workman's execution. We ask that the Commission contact the Governor of Tennessee as well as the U.S. State Department to request precautionary measures to prevent the wrongful execution of Mr. Workman and so that this case may be heard by the Commission. We also ask that the Commission set this case for hearing on its next available calendar.

Communications with the Governor of Tennessee should be sent to:

The Honorable Don Sundquist
Governor of Tennessee
Office of the Governor
State Capitol
Nashville, TN 37243-0001

Telephone: (615) 741-2001
Fax: (615) 532-9711

Thank you for your assistance and attention to this urgent matter.

Sincerely.

Jen Cromwell
Student Attorney

Dee Daniels
Student Attorney

Prof. Richard J. Wilson
Director, Int'l Human Rights Law Clinic
Washington College of Law
The American University

April 3, 2000

TO THE HONORABLE MEMBERS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES

PHILIP RAY WORKMAN,
A United States citizen,
Petitioner/Victim

v.

THE UNITED STATES OF AMERICA
and THE STATE OF TENNESSEE
Respondents

PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF PHILIP RAY WORKMAN BY THE UNITED STATES OF AMERICA AND THE STATE OF TENNESSEE

The request for precautionary measures and this petition is respectfully presented to this Honorable Commission pursuant to Articles 26, 27 and 29 of the Regulations of the Inter-American Commission on Human Rights, on behalf of Philip Ray Workman, a United States Citizen, by:

Jen Cromwell and Dee Daniels
Student Attorneys
With Richard J. Wilson
Counsel for Petitioner in International Matters

International Human Rights Clinic
Washington College of Law
The American University
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Washington, DC 20016-8184
United States of America
Tel. (202) 274-4147
Fax (202) 274-0659

URGENT: PETITIONER FACES EXECUTION, APRIL 6, 2000 at 1am

I. INTRODUCTION

Currently incarcerated on death row, Philip Ray Workman, a United States Citizen, is scheduled to be killed by lethal injection, in the state of Tennessee on April 6, 2000 at 1:00 a.m. New evidence which previously could not be procured exculpates Mr. Workman from the capital offense with which he was charged. However, the United States and Tennessee Courts refuse to hear this new evidence. By sentencing Mr. Workman to death, Tennessee and the United States have violated and continue to violate Articles XVIII, (right to a fair trial), XXVI, (right to due process of law), and I, (right to life) of the American Declaration of the Rights and Duties of Man, and the object and purpose of the American Convention on Human Rights specifically Article 4(3) (right to life and prohibition on the reestablishment of the death penalty in states that have abolished it).

Mr. Workman petitions this Honorable Commission for relief from the ongoing violations of his human rights under the American Declaration of the Rights and Duties of Man. Mr. Workman requests that this Honorable Commission take precautionary measures to prevent his wrongful death. Mr. Workman does not require his name be kept confidential.

II. FACTUAL BACKGROUND[1]

On August 5, 1981, while Mr. Workman robbed a Wendy's restaurant, an employee tripped a silent alarm. Police officers Ronald Oliver, Aubrey Stoddard, and Stephen Parker responded. When Mr. Workman walked out of the Wendy's Restaurant, Officer Oliver approached him. Mr. Workman attempted to run, and a struggle ensued between him and the three officers. Workman was hit over the head with a gun, and gun shots were discharged from

[1] Factual Background from the Petition for Writ of Certiorari, Supreme Court of the United States, October 1999.

the guns of Mr. Workman and the officers. Officer Oliver died from a gunshot wound to his chest. Mr. Workman was charged with first degree felony murder and convicted. However, the facts during the struggle are not clear.

Ballistic evidence recently obtained by Mr. Workman proves the bullet which killed Officer Oliver did not come from Mr. Workman's gun. The District Attorney's office withheld from Mr. Workman until March 2000, an x-ray taken of Officer Oliver that further supports the ballistics findings and Mr. Workman's innocence. The District Attorney's office withheld this evidence even though the Medical Examiner's Office was served a subpoena on June 2, 1995, that requested the production of, among other things, any x-ray taken of Lieutenant Oliver's corpse.[2] Although the Medical Examiner's Office produced documents responsive to the subpoena, they did not produce the Oliver x-ray.[3]

On February 28, 2000, Mr. Workman learned the x-ray evidence existed when the District Attorney's Office, in its opposition to Mr. Workman's application for commutation of his death sentence, included a report with a statement from Dr. Smith stating that he examined a chest x-ray of Lieutenant Oliver prior to writing his report.[4] The State's previous claim that they did not have this x-ray was clearly false. They were in possession of the x-ray since it was taken and produced it only when it served their purposes.

In addition to the exculpatory x-ray evidence, the only eyewitness the state produced at trial has now fully recanted his testimony. Harold Davis testified that he saw Mr. Workman

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[2] Memorandum in Support of Motion to Reopen, US Court of Appeals for the 6th Circuit.

[3] Memorandum in Support of Motion to Reopen, US Court of Appeals for the 6th Circuit.

[4] Memorandum in Support of Motion to Reopen, US Court of Appeals for the 6th Circuit.

shoot Officer Oliver. Mr. Davis testified that he parked his car on the Wendy's parking lot and was present when the police officers arrived at the scene. However, no civilian or police eyewitness to events before, during and immediately after the Oliver shooting saw Mr. Davis or any car that could have belonged to him.[5] Contemporaneous police reports listing witnesses to events surrounding the shooting do not mention Mr. Davis.[6] The crime scene diagram reflects that no vehicle was parked on the Wendy's lot in the place where Mr. Davis claimed he parked his car.[7] Moreover, Mr. Davis did not attend a lineup held upon Workman's capture, which every available witness attended.[8] Today, Mr. Davis recants his testimony, admitting that he did not see the struggle and that the police asked him to perjure his testimony.

III. PROCEDURAL BACKGROUND[9]

- March, 1982, Shelby County, Tennessee, Criminal Court Conviction and Death Sentence of Philip Workman.
- January, 1984, Tennessee State Supreme Court affirms Philip Workman's conviction and sentence.
- October, 1984, US Supreme Court denies request that it review Mr. Workman's case.
- March, 1985, Philip Workman files his first State post-conviction petition in Shelby County Criminal Court, which is denied in February 1986.
- February, 1987, Tennessee Court of Criminal Appeals affirms Shelby County Criminal Court's Denial of Post-Conviction Relief.

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[5] Motion for declaration that 28 USC 2244 Does Not Apply to Specified Claims, pg. 10.

[6] Motion for declaration that 28 USC 2244 Does Not Apply to Specified Claims, pg. 10.

[7] Motion for declaration that 28 USC 2244 Does Not Apply to Specified Claims, pg. 10.

[8] Motion for declaration that 28 USC 2244 Does Not Apply to Specified Claims, pg. 10.

[9] Affidavit of Christopher M. Minton.

- October, 1987, US Supreme Court denies request to review the denial of post conviction relief.
- November, 1987, Philip Workman files habeas corpus petition in US District Court, Western District of Tennessee.
- June, 1989, Mr. Workman files in Shelby County Criminal Court a second petition for post conviction relief.
- September, 1991, US District Court dismisses habeas corpus petition due to pending State litigation.
- March, 1992, Shelby County Criminal Court dismisses Philip Workman's second request for post-conviction relief.
- April, 1993, Tennessee Court of Criminal Appeals affirms Shelby County Criminal Court's dismissal of second post-conviction petition.
- November, 1993, Tennessee Supreme Court denies request that it review the dismissal of second post conviction petition.
- February, 1994, US Supreme Court denies request that it review the dismissal of second post conviction petition.
- July, 1994, Philip Workman files a habeas corpus petition in US District Court, Western District of Tennessee.
- October, 1996, US District Court dismisses the habeas corpus petition.
- October, 1998, US Court of Appeals for the 6th Circuit affirms the US District Court's dismissal of Mr. Workman's habeas corpus petition.
- May, 1999, US Court of Appeals amends its opinion and denies Philip Workman's request that it rehear the case.
- October, 1999, US Supreme Court denies request that it review the decision of the US Court of Appeals for the 6th Circuit.
- March, 2000, The US Court of Appeals for the 6th Circuit dismisses Mr. Workman's: 1. motion for leave to file a second habeas corpus petition; 2. motion for declaration that 28 USC 2244 does not apply to specified claims; and 3. motion for stay of execution.

IV. THIS PETITION IS ADMISSIBLE UNDER ARTICLE 37 OF THE REGULATIONS OF THE INTER-AMERICAN COMMISSION BECAUSE PETITIONER HAS EXHAUSTED DOMESTIC REMEDIES.

Mr. Workman asks this Honorable Commission to find that he has exhausted all domestic remedies pursuant to Article 37 of the Regulations of the Inter-American Commission.

Mr. Workman was scheduled for a Clemency hearing on March 9, 2000. However, when Mr. Workman discovered the State withheld the Oliver x-ray, he decided to pursue a reopening of his case in the Sixth Circuit. In light of Workman's attempt to reopen the case, the clemency board refused to reschedule a clemency hearing, thereby forcing him to chose between the two appellate procedures. The Governor has subsequently requested that Mr. Workman and his local counsel attend a clemency hearing April 3, 2000. The scheduled clemency hearing will not occur in front of the entire clemency board. Instead, it will be heard by one person designated by the Governor. The April 3 hearing is significantly shorter than normal, with only one and one-half hours allotted for all concerned parties to be heard on the issue instead of a normal full-day hearing. This shortened hearing puts Mr. Workman at a disadvantage because he will have to present an abbreviated version of his case for clemency. Local counsel is unsure of how to interpret this request for an abbreviated hearing, and they remain concerned that Mr. Workman's request for clemency will not be granted.

Mr. Workman has attempted without success to reopen his case and have State and Federal Courts review the new exculpatory evidence that would prove his innocence. On March 31, 2000, the Sixth Circuit Court of Appeals rejected Mr. Workman's latest motion to stay the execution and to reopen his case, so the new evidence will not be heard. If domestic courts have already refused to hear new exculpatory evidence, it is highly unlikely that any other claim will

be heard. Therefore, Mr. Workman has no effective remaining domestic remedies and this case is ripe to be heard by the Commission.

V. ARGUMENT ON THE MERITS

A. The American Declaration of the Rights and Duties of Man Binds the United States as a Matter of International Law.

"[T]he international obligation of the United States as a member of the OAS, under the jurisdiction of the IACHR is governed by the Charter of the OAS (Bogota, 1948), as amended by the protocol of Buenos Aires on 27 February 1967, ratified by the United States on 23 April 1968."[10] The OAS Charter, the American Declaration of the Rights and Duties of Man, and the Statute and Regulations of the IACHR have acquired binding force for OAS members.[11] In relation to states such as the United States, which are OAS members but not parties to the American Convention on Human Rights, the Statute entrusts the IACHR with the competence to promote the observance of and respect for those rights set forth in the American Declaration of the Rights and Duties of Man (hereinafter American Declaration).[12]

Articles I, XVIII, and XXVI of the American Declaration, whose violation alleged here, are among those which the Commission is especially responsible for enforcement in relation to

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[10] Case 9647 (United States) Res. 3/87 of 27 March 1987, in 1986-1987 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser. L/L/V/II.71, doc. 9, rev. 1, (22 September 1987), at 147 et seq.

[11] Case 9647, supra, para. 48, citing Thomas Burgenthal, "The Revised OAS Charter and the Protection of Human Rights," 69 A.J.I.L. 828 (1975) and case 2141 (United States) Res, 23/81 of 6 March 1981 OAS Ser, L/V/II, 52, doc. 48, para. 16 (1981) in 1980-81 Annual Report of the Inter-American Commission on Human Rights OEA Ser. L/V/II.52, doc. 9, rev. 1 (16 October 1981) at 25 et seq.

[12] Case 9647, supra., para. 49.

those members states of the OAS that are not parties to the American Convention on Human Rights (hereinafter American Convention).[13]

B. By Denying Mr. Workman a Fair Trial and Due Process of Law, the United States and Tennessee Governments Violate Mr. Workman's Right to Prove His Innocence, Implicit in Articles XVIII and XXVI to the American Declaration.

Article XVIII of the American Declaration states:

> Every person may resort to the courts to ensure respect for his legal rights.

Article XXVI of the American Declaration states:

> Every person accused of an offense has the right to be given an impartial and public hearing.

The United States and Tennessee Governments have violated Mr. Workman's right to a fair trial, Article XVIII, and his right to due process of law, Article XXVI, by denying Mr. Workman a fair hearing where he could present exculpatory evidence which would prove his innocence.

Mr. Workman was convicted and sentenced to death for the murder of Officer Oliver in a Wendy's parking lot in Tennessee on August 5, 1981. The prosecution's case against Mr. Workman rested upon Harold Davis, the only person who testified to seeing Mr. Workman shoot Officer Oliver. Mr. Davis now recants his testimony.

In 1999, when Mr. Workman's counsel located Mr. Davis, "Davis admitted that he did not see Workman shoot Oliver, and he said that authorities threatened to arrest him if he did not

[13] Pursuant to Article 20, paragraph (a) of the Statute of the IACHR, this Commission, in relation to those member states of the OAS that are not parties to the American Convention on Human Rights, is admonished "to pay particular attention to the observance of the human rights referred to in articles I, II, III, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man."

travel to Memphis and testify at Workman's trial."[14] A month and a half later, Mr. Davis confirmed that he did not see Mr. Workman shoot Mr. Oliver, and that he testified against Mr. Workman because authorities threatened him.[15] Harold Davis was the only witness to provide evidence that Mr. Workman was guilty of a capital crime.[16] The only reason the jury found Mr. Workman shot Oliver is because of Mr. Davis' false and perjured testimony. However, U.S. and Tennessee Courts have failed to provide a hearing in which this new exculpatory evidence of Mr. Davis' recantation can be heard, thereby violating Mr. Workman's right to a fair hearing and due process of law.

Mr. Workman sought to no avail to introduce new ballistic evidence that would prove that he did not commit murder. The ballistics evidence rested on the findings of several ballistics experts that stated that the kind of bullet in Mr. Workman's gun would have left a larger exit wound than entrance wound in Officer Oliver if it had even exited the body.[17] The exit wound was, in fact, smaller than the entrance wound.[18] Experts agreed that the fatal injury could not have been caused by a bullet from Mr. Workman's gun, which would mushroom on impact, thereby leaving a larger exit wound in those unusual instances when the bullet exits the body.[19]

In November 1990, pursuant to the Tennessee Public Records Act, Mr. Workman requested any document in possession or control of the Shelby County Medical Examiner's

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[14] Philip Ray Workman's Motion for Declaration that 28 USC 2244 Does not apply to Specified Claims

[15] Philip Ray Workman's Motion for Declaration that 28 USC 2244 Does not apply to Specified Claims

[16] Motion for Leave to File a Second Habeas Corpus Petition.

[17] Motion for Leave to File a Second Habeas Corpus Petition.

[18] Motion for Leave to File a Second Habeas Corpus Petition.

[19] Motion for Leave to File a Second Habeas Corpus Petition.

Office relating to, or reflecting upon, the crime for which he was sentenced to death. Although the Medical Examiner's Office produced some documents, it did not produce an x-ray taken of Officer Oliver's chest.[20] In June 1995, Mr. Workman served a subpoena on the Medical Examiner's Office specifically requesting the production of any x-ray taken of Oliver's corpse, and the Medical Examiner's Office failed to produce the Oliver x-ray.[21]

When the 6th Circuit U.S. Federal Court of Appeals issued its 1998 and 1999 decisions affirming the U.S. Federal District Court's dismissal of Mr. Workman's habeas corpus petition and denying Mr. Workman's request for a new hearing, it had been presented with the new ballistic evidence relating to the size of the exit wound and the type of bullets in Mr. Workman's gun. The Court speculated that a bullet from Mr. Workman's gun had fragmented in Officer Oliver's body and that the supposed fragmentation accounted for the smaller exit wound.[22] Because the State Medical Examiner's Officer withheld the x-ray of Officer Oliver that showed the bullet did not fragment, the Court was allowed to conjure up an explanation that denied the ballistics evidence establishing Mr. Workman's innocence.[23]

Mr. Workman now has the Oliver x-ray which proves the bullet did not fragment, and that the fatal wound was not caused by a bullet from Mr. Workman's gun. The type of bullet in Mr. Workman's gun rarely leaves the body, and if it does, leaves an exit wound larger than the entrance wound as the bullet expands on entry. Mr. Workman only discovered the Oliver x-ray

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[20] Memorandum in Support of Motion to Reopen, U.S. Court of Appeals for the 6th Circuit.

[21] Memorandum in Support of Motion to Reopen, U.S. Court of Appeals for the 6th Circuit.

[22] Workman v. Bell, 160 F. 3d 276 (6th Cir. 1998), Order on Rehearing in Workman v. Bell, No. 96-6652 (6th Cir. 1999), both decisions attached to Workman v. Bell, Petition for Writ of Certiorari in the Supreme Court of the United States.

[23] Workman v. Bell, 160 F. 3d 276 (6th Cir. 1998), Order on Rehearing in Workman v. Bell, No. 96-6652 (6th Cir. 1999), both decisions attached to Workman v. Bell, Petition for Writ of Certiorari in the Supreme Court of the United States.

existed when the District Attorney's office filed its opposition to a clemency request that Mr. Workman filed. The District Attorney's brief in opposition to clemency included a report from a Dr. O.C. Smith that stated that prior to drafting his report, he examined a chest x-ray of Oliver. This x-ray proves Mr. Workman's innocence. It establishes the fact that the fatal bullet did not come from Mr. Workman's gun, and he is therefore innocent of capital murder. However, Mr. Workman's attempt to present this evidence to the Court has been futile. State and Federal Courts will not reopen the case to hear this vital information establishing Mr. Workman's innocence.

Therefore, by not hearing the exculpatory evidence of Mr. Davis' recantation and the Oliver x-ray, Tennessee and the United States have violated and continue to violate Mr. Workman's rights to a fair trial and due process of law as protected by the American Declaration.

C. The United States and Tennessee Governments Are in Violation of Article I of the American Declaration and the Object and Purpose of Article 4(3) of the American Convention.

Mr. Workman's scheduled execution would violate Article I of the American Declaration. Article I secures Mr. Workman's right to life stating:

> Every human being has the right to life, liberty and security of his person.

Mr. Workman's rights under the American Convention will also be violated if his execution is carried out. The United States and the State of Tennessee will violate the object and purpose of the American Convention whose Article 4(3) states that:

> The death penalty shall not be reestablished in states that have abolished it.

The United States signed the American Convention on Human Rights 1 June 1977, at the OAS General Secretariat. While the United States has yet to ratify the American Convention, it is still bound by international law not to act in violation of the object and purpose of the Convention while ratification is pending.[24] The State of Tennessee is also bound by the international conventions the United States signs. Among the objects and purposes of the American Convention is the limitation and eventual abolition of the death penalty.

The State of Tennessee has not executed anyone in 40 years since November 7, 1960.[25] Tennessee has sentenced individuals to death, but has not actually killed anyone for the past 40 years. Non-use of the death penalty is a *de facto* abolishment of the death penalty. Tennessee's *de facto* abolishment of the death penalty serves the purpose of the American Convention's limitation and eventual abolition of the death penalty.

The United States, through its federal system, delegates to its states the power to determine punishment for criminal violations. The United States is subsequently bound by its states' decisions regarding the use of the death penalty including abolition of the death penalty. Tennessee has effectively abolished the death penalty through its lack of use, and the United States is bound by Tennessee's inaction. Executing Mr. Workman on April 6 would be in direct violation of the object and purpose of the American Convention which under Article 4(3) prohibits a state from reestablishing the death penalty once it has been abolished.

VI. CONCLUSION

Mr. Workman's petition is admissible under Article 37 of the Commission's Regulations.

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[24] Vienna Convention on the Law of Treaties, Article 18a.

[25] Tennessee Department of Corrections, "Frequently Asked Questions," [article on-line]; Internet: available from http://www.state.tn.us/correction/faq.html; accessed 2 April 2000.

He has exhausted domestic remedies.

The United States and Tennessee Governments have violated Mr. Workman's human rights by denying him his right to a fair trial and due process of law. The United States and Tennessee Governments are moving to deny Mr. Workman his right to life by executing him on April 6, 2000 at 1:00 a.m.

Mr. Workman respectfully requests that the Commission take precautionary measures on his behalf and hear and decide his case on the merits. Without the protection of the Commission, Tennessee will execute an innocent man.

Respectfully submitted,

Jen Cromwell
Student Attorney

Dec Daniels
Student Attorney

Richard J. Wilson
Counsel for Petitioner

Privy Council Office
Judicial Committee

Privy Council Appeals Nos. 60 of 1999, 65 of 1999

69 of 1999 and 10 of 2000

(1) Neville Lewis

(2) Patrick Taylor and Anthony McLeod

(3) Christopher Brown

(4) Desmond Taylor and Steve Shaw *Appellants*

v.

(1) The Attorney General of Jamaica and

(2) The Superintendent of St. Catherine District Prison *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 12th September 2000

Present at the hearing:-

Lord Slynn of Hadley

Lord Nicholls of Birkenhead

Lord Steyn

Lord Hoffmann

Lord Hutton

*[Majority Judgment delivered by **Lord Slynn of Hadley**]*

These six appellants have been sentenced to death in Jamaica after conviction of murder. The appeals have been heard together because they all raise two important points – put broadly (a) whether on a petition for mercy (after all other domestic attempts to set aside the convictions or to prevent execution have been exhausted) the appellants are entitled to know what material the Jamaican Privy Council had before it and to make representations as to why mercy should be granted and (b) whether they have a right not to be executed before the Inter-American Commission on Human Rights or the United Nations Human Rights Committee has finally reported on their petitions. In addition the appellants contend that the passage of time and the several ways in which they were treated in prison constituted inhuman or degrading treatment within the meaning of the Constitution of Jamaica so that they should not be executed.

The Board has had the great advantage of full and carefully prepared arguments of principle on behalf of all the appellants and the Attorney-General of Jamaica. Moreover, exceptionally, because the Board was being asked to review the decisions of the Board in *de Freitas v. Benny* [1976] A.C. 239, and in *Reckley v. Minister of Public Safety and Immigration (No. 2)* [1996] A.C. 527, the Attorney-General of Trinidad and Tobago and The Bahamas were given leave to intervene as also were five petitioners from Belize. The Board is grateful to all counsel, and to the firms of solicitors who have conducted these appeals, for their assistance not only in the written cases and at the hearing but also in supplementary submissions sent by the respondents on 17th May 2000, by the interveners on 22nd May and by the appellants in reply on 26th May 2000. All these appeals come from decisions of the Court of Appeal of Jamaica on constitutional motions.

The Constitution

Section 13 of the Constitution contained in Schedule 2 to the

Jamaica (Constitution) Order in Council 1962 (S.I. 1962 No. 1550) provides that every person in Jamaica is entitled to the fundamental right without discrimination, but subject to the rights and freedoms of others and the public interest, *inter alia* to "the protection of the law". Subsequent provisions of Chapter III "shall have effect for the purpose of affording protection to" such right.

By section 1(1) "'law' includes any instrument having the force of law and any unwritten rule of law".

By section 14(1): "No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted". By section 17(1): "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

By section 25 a person who alleges that "any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, ... may apply to the Supreme Court ... [which] may make such orders ... and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled".

The chronology

Neville Lewis

Neville Lewis was convicted on 14th October 1994 of the murder on 18th October 1992 of Vic Higgs and was sentenced to death. His appeal against conviction was dismissed on 31st July 1995 and on 13th February 1996 the Jamaican Privy Council refused to recommend that the prerogative of mercy be exercised in his favour. On 2nd May 1996 he was refused special leave to appeal by the Board, and on 24th May 1996 he petitioned the United Nations Human Rights Committee. On 17th July 1997 the United Nations Human Rights Committee declared that articles 9(3) also 0(1) and 10(2)(a) of the International Covenant on Civil and Political Rights had been violated in his case. On 9th September 1997 a second petition for mercy was refused by the Jamaican Privy Council and on 12th September a warrant for his execution on 25th September was read to him but that was withdrawn three days later. On 2nd October 1997 he made an application to the Inter-American Commission on Human Rights which on 20th November 1997 asked Jamaica to stay Lewis' execution until it had a chance to investigate his case.

On 14th August 1998 a second warrant was issued this time for

execution on 27th August but following his application under the Constitution (sections 13, 14, 17 and 24) a stay of execution was granted on 20th August. On 17th December 1998 the Inter-American Commission declared his application inadmissible but without prejudice to his right to resubmit it later.

The application under the Constitution was refused by the Supreme Court on 7th January 1999 and a third warrant for execution on 2nd February 1999 was issued on 20th January. On 3rd February the Court of Appeal granted a stay of execution until the determination of his appeal from the Supreme Court's decision. That appeal was allowed in part in that the Governor-General's instructions published on 7th August 1997 laying down a timetable for the conduct of applications to international human rights bodies were held to be unlawful. The Court ruled that the appellant was entitled to have his petition to the Inter-American Commission decided as part of his right to the protection of the law and the time limits laid down were in any event too short. The Court of Appeal held, however, that his rights under the Constitution had not been violated so that he was refused relief on the constitutional motion. On 21st September 1999 the appellant was granted leave to appeal to the Privy Council and his execution was stayed.

Patrick Taylor

On 25th July 1994 Patrick Taylor was convicted with his brother Desmond Taylor and Steve Shaw on four counts of non-capital murder on 27th March 1992 and he was sentenced to death because of the multiple murders. On 24th July 1995 his appeal against conviction was dismissed and on 6th June 1996 the Board refused him special leave to appeal. Following his application on 14th June 1996 the United Nations Human Rights Committee found violations of articles 6, 9(2) and (3), 10(1), 14(1) and (3)(c) of the International Covenant on Civil and Political Rights and held that he was entitled to commutation of the death sentence.

In 1998 on 10th July he was told by the Jamaican Government that the opinion of the United Nations Human Rights Committee would not be followed and that he would not be granted mercy. On 19th August his application to the Inter-American Commission was held inadmissible because he had already applied to another international body but the Commission asked Jamaica to commute the death sentence for humanitarian reasons.

In 1999 a warrant for his execution on 26th January was read to him on 15th January. He brought a constitutional motion on 22nd January but a stay of execution was refused initially by the judge on 25th January and then on 20th May by the Court of Appeal. On 14th June he was given conditional leave and on 25th October final

leave to appeal to the Board and a stay was granted. The Court of Appeal which heard his appeal heard at the same time the appeals of McLeod and Brown.

Anthony McLeod

On 22nd September 1995 McLeod was convicted of the murder of Anthony Buchanan on 3rd December 1994 and sentenced to death. His application for leave to appeal against conviction was dismissed on 20th March 1996 his counsel having conceded, it is said erroneously, that there were no arguable grounds of appeal. In 1997 the Board refused him special leave to appeal on 16th January and on the same day a submission was made to the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. The Committee's response was adopted on 31st March 1998. On 20th July 1998 a further submission was made to the Inter-American Commission on Human Rights but on 3rd August they replied that the submission could not be processed since an application had already been considered by another international organisation. They wrote however to Jamaica asking for the sentence to be commuted on humanitarian grounds.

In 1999 on 25th January a writ was issued claiming that it would be unlawful to execute him. His application for a stay of execution pending the determination of his constitutional action was dismissed by the trial judge and by the Court of Appeal. The latter however gave leave to appeal to the Board.

Christopher Brown

On 28th October 1993 Brown was convicted of the murder of Alvin Smith on 16th October 1991 and was sentenced to death. On 18th July 1994 his appeal was allowed and a retrial ordered at which on 23rd February 1996 he was convicted and sentenced to death. In 1997 on 23rd October his petition to the Board was dismissed and he lodged an application with the United Nations Human Rights Committee on 12th November. His further application on 3rd August 1998 to the Inter-American Commission on Human Rights was declared inadmissible on 19th August because of his pending application to the United Nations Human Rights Committee. On 15th January 1999 a warrant for his execution on 28th January was read to him. On 26th January he brought a constitutional motion and asked for a stay of execution. This was refused save that execution was stayed until 2nd February to enable him to appeal to the Court of Appeal. On 20th May the Court of Appeal stayed execution until the Jamaican Privy Council had considered the United Nations Committee's report. The Jamaican Privy Council refused to exercise the prerogative of

Desmond Taylor and Steve Shaw (on 9th April 1999) each claimed that because of the time he had spent in prison, because of the conditions in which he was kept and because of the failure to provide legal aid his execution would constitute inhuman and degrading treatment contrary to section 17 of the Constitution. Each further contended that his execution would violate (a) his right not to be deprived of his life save by due process of law contrary to section 13(a) and section 14(1) of the Constitution, (b) his right to the protection of the law under section 13(a) and (c) his right of equal treatment by a public authority under section 24(2) of the Constitution. Moreover his rights under section 13(a) and 14(1) were violated because he was denied natural justice when the Jamaican Privy Council considered his reprieve in that he did not know when they were to meet, what they had before them and because he was not allowed to make representations nor was he given reasons why the Jamaican Privy Council had not followed the recommendation of the United Nations Committee.

Christopher Brown claimed on 26th January 1999 that the time he had spent in prison and the conditions in which he had been kept violated his rights under section 17 of the Constitution. He contended that the Governor-General's instructions of 6th August 1997 were unlawful and contrary to sections 13, 14, 17 and 24 of the Constitution and that in any event since he complied with time limits laid down in the Governor-General's instructions he had a legitimate expectation that the Governor-General and the Jamaican Privy Council would not refuse mercy or issue a death warrant whilst the United Nations Committee and the Inter-American Commission were considering his petition and further that when they came to exercise their functions under sections 90 and 91 of the Constitution they would take into account the recommendation and decision of those bodies.

All the appellants ask for consequential relief to annul or defer the carrying out of the orders for execution.

The judgments in the Court of Appeal

Neville Lewis.

The Supreme Court on 7th January 1999 dismissed the action. In the Court of Appeal Forte J.A. held that the right to "the protection of the law" in section 13 of the Jamaican Constitution covered the same grounds as a right to "due process of law" as in section 4(a) of the Trinidad and Tobago Constitution. "You cannot have protection of the law, unless you enjoy 'due process of the law'" he continued:-

"I would hold that the appellant enjoys the

> 'protection of law' which would give the appellant a constitutional right to procedural fairness. Although decisions of the Governor General in the exercise of the Prerogative of Mercy are not justiciable, nevertheless the Courts can in accordance with the procedural fairness guaranteed by the Constitution, require the Governor General to consider matters that by virtue of the law and the Constitution, he is mandated to consider in coming to his decision. In those circumstances even though the recommendation of the Commission are not binding on the Governor General in the exercise of the Prerogative of Mercy, given the terms of the Treaty which the Government ratified, the Privy Council ought to await the result of the petition, so as to be able to give it consideration in determining whether to exercise the prerogative of mercy."

To require the Commission to complete its process in six months when the Commission regulation allowed a maximum period of 510 days was disproportionate. The Governor-General's instructions were therefore unlawful. Forte J.A. accordingly said that "I would be minded to uphold the contention of the appellant, and find that the death warrant should be stayed pending the result of the petition" before the Inter-American Commission on Human Rights.

Downer and Langrin J.J.A. agreed that the instructions were unlawful. They also agreed that section 13 of the Constitution conferred "a right of procedural fairness". This ruling as to the lawfulness of the instructions is challenged by the Attorney-General's cross-appeal.

Patrick Taylor, Anthony McLeod and Christopher Brown.

Downer and Panton J.J.A. (Ag.) rejected all the grounds advanced but granted a temporary stay of execution pending an appeal to the Board but in the case of Christopher Brown a stay pending the determination of his case before the United Nations Human Rights Committee and the Governor-General in the Privy Council of Jamaica was also granted. This did not apply to Patrick Taylor and McLeod since the United Nations Human Rights Committee had already stated its decision. In other respects they dismissed the appeal. Langrin J.A. (Ag.) held that the question whether there was a right to make representations was an arguable point which

ought to be dealt with by the constitutional court. He found the Governor-General's instructions to be unlawful as disproportionate because of the majority judgment in *Thomas v. Baptiste* [1999] 3 W.L.R. 249. He accordingly would have allowed the appeal.

Desmond Taylor and Steve Shaw.

This was an appeal to obtain a stay of execution pending the determination of the Supreme Court on the constitutional motion. It was held that there was no argument to go before the constitutional court, the proceedings before the Jamaican Privy Council were not justiciable. Its function was purely discretionary. There was insufficient evidence of ill-treatment during the post-conviction period and the period of five years had not been exceeded. A stay was however granted pending an application for leave to the Board.

The issues

The prerogative of mercy.

The Constitution provides in section 90 that:-

> "(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf –
>
> > (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions; ...
> >
> > (c) substitute a less severe form of punishment for that imposed on any person for such an offence; or
> >
> > (d) remit the whole or part of any punishment imposed on any person for such an offence ...
>
> (2) In the exercise of any powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council."

The Privy Council of Jamaica consists of six members appointed by the Governor-General, after consultation with the Prime Minister and at least two of the members of the Privy Council shall be persons who hold or have held public offices: (section 82). By section 87 the Governor-General "shall, so far as is practicable, attend and preside at all meetings of the Privy Council" and by section 88(3): "Subject to the provisions of this Constitution, the Privy Council may regulate its own procedure".

By section 91:-

> "(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.
>
> (2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

The only material which the Privy Council of Jamaica is expressly required by this section to have is thus a written report on the case from the trial judge and such information as the Governor-General on the recommendation of the Jamaican Privy Council may require. It is plain that in advising the Governor-General under section 90(2) the Privy Council must have regard to this material. The question is thus whether a person under sentence of death is entitled to see that material and to put further material before the Jamaican Privy Council and to comment on what they have. It is accepted that none of the appellants saw the material which was before the Jamaican Privy Council when it considered the petition for mercy, and that they did not make such representations. Although the contention that he was entitled to make representations was not raised initially by Neville Lewis it was raised before the Court of Appeal by the other appellants and it is

right on this appeal that it should be considered in respect of all the appellants.

The Attorney-General contends that the appellants have no right to see the material nor do they have any right to make representations.

The Attorney-General relies principally on *de Freitas v. Benny* [1976] A.C. 239 and *Reckley v. Minister of Public Safety and Immigration (No. 2)* [1996] A.C. 527.

In *de Freitas v. Benny* Lord Diplock said at p.247:-

> "Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign ... Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy."

He went on to say at pages 247-248 that although the Home Secretary in practice called for a report of the case from the trial judge and such other information as he thought helpful "it was never the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives".

Lord Diplock said at page 248 that the fact that the Governor-General was required to exercise a prerogative on the advice of a Minister designated by him:-

> "does no more than spell out a similar relationship between the designated Minister and the Governor-General acting on behalf of Her Majesty to that which exists between the Home Secretary and Her Majesty in England under an unwritten convention of the British Constitution. It serves to emphasise the personal nature of the discretion exercised by the designated Minister in tendering his advice."

The only novel feature was that the Minister in a death sentence case was required to consult with an Advisory Committee which although it saw the information that the Minister had required to be obtained "still remains a purely consultative body without any decision-making power". Lord Diplock concluded at page 248:-

> "In their Lordships' view these provisions are not capable of converting the functions of the Minister, in relation to the advice he tenders to the Governor-General, from functions which in their nature are purely discretionary into functions that are in a sense quasi judicial."

Accordingly the appellant had no right to see the material furnished to the Minister.

In *Reckley No. 2* Lord Goff of Chieveley giving the opinion of the Board considered first the submission that the prerogative of mercy was amenable to judicial review. He compared the provisions of the Constitution of The Bahamas with those of the Constitution of Trinidad and Tobago which were in issue in *de Freitas*. In the former the designated Minister who exercised the discretion received the advice of an Advisory Committee. This was seen as reinforcing Lord Diplock's analysis in *de Freitas* at pages 247-248. Lord Goff said:-

> "First of all, it is made plain that every death sentence case must be considered by the advisory committee. There is no question of such consideration depending on any initiative from the condemned man or his advisers. Second, despite the obvious intention that the advisory committee shall be a group of distinguished citizens, and despite the fact that the minister is bound to consult with them in death sentence cases, he is not bound to accept their advice. This provides a strong indication of an intention to preserve the status of the minister's discretion as a purely personal discretion, while ensuring that he receives the benefit of advice from a reputable and impartial source. Indeed it may be inferred that the reason why provision was made in the Constitution for an advisory committee was to provide a constitutional safeguard in circumstances where the minister's discretionary power was of such a nature that it was not subject to judicial

> review. Third, the material which has to be taken into consideration at the meeting of the advisory committee is, apart from the trial judge's report, 'such other information derived from the record of the case or elsewhere as the minister may require'. This provision, which is consistent with the practice formerly applicable in England in the consideration of death sentence cases by the Home Secretary, is inconsistent with the condemned man having a right to make representations to the advisory committee." (pp. 539-540)

Having said that the person charged had legal rights, namely trial before judge and jury, an appeal to the Court of Appeal and his right to the protection of the law even after sentence of death by constitutional motion under article 28 of the Constitution of The Bahamas if the delay was such that to execute was inhuman or degrading treatment or because there had been "a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the Constitution" he continued at p. 540:-

> "But the actual exercise by the designated minister of his discretion in death sentence cases is different. It is concerned with a regime, automatically applicable, under which the designated minister, having consulted with the advisory committee, decides, in the exercise of his own personal discretion, whether to advise the Governor-General that the law should or should not take its course. Of its very nature the minister's discretion, if exercised in favour of the condemned man, will involve a departure from the law. Such a decision is taken as an act of mercy or, as it used to be said, as an act of grace."

The second submission that the principle of fairness required that the petitioner should be entitled to make representations to the advisory committee and for that purpose to see the material which it had was also rejected at p. 542:-

> "Indeed it is clear from the constitutional provisions under which the advisory committee is established, and its functions are regulated, that the condemned man has no right to make representations to the

> committee in a death sentence case; and, that being so, there is no basis on which he is entitled to be supplied with the gist of other material before the committee. This is entirely consistent with a regime under which a purely personal discretion is vested in the minister. Of course the condemned man is at liberty to make such representations, in which event the minister can (and no doubt will in practice) cause such representations to be placed before the advisory committee, although the condemned man has no right that he should do so."

He attached considerable importance to the composition of the advisory committee:-

> "In this connection their Lordships wish to stress the nature of the constitutional safeguard which the introduction of the advisory committee has created. On the committee, the designated minister and the Attorney-General will be joined by a group of people nominated by the Governor-General. These will, their Lordships are confident, be men and women of distinction, whose presence, and contribution, at the heart of the process will ensure that the condemned man's case is given, and is seen by citizens to be given, full and fair consideration. Such people as these will expect to be provided with all relevant material, including any material supplied by or on behalf of the condemned man; and in the most unlikely event that the responsible civil servants do not place such material before them, they are perfectly capable of making the necessary inquiries. It is plain to their Lordships that those who drew the Constitution of The Bahamas were well aware of the personal nature of the discretion to be exercised by the minister and the consequent absence of any supervisory role by the courts, but also considered that, by introducing an advisory committee with the constitution and functions specified in the Constitution, they were providing a safeguard both appropriate and adequate for the situation."

In *Reckley No. 2* the Board found that the decisions in *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349 and *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672 relied on by the petitioner as indicating a power in the courts to review the prerogative decisions there in question were not directly concerned with the exercise of the prerogative of mercy after sentence of death had been pronounced and therefore were not of assistance.

It is clear that there are differences between the procedures in Trinidad and Tobago at the time of *de Freitas v. Benny* and in The Bahamas at the time of *Reckley No. 2*. Further the appellants say that in Trinidad and Tobago a government minister is given the effective power to decide whether to commute or pardon which is "a highly personal decision" (Taylor and McLeod's case, para. 10) whereas in Jamaica the effective power is in the Jamaican Privy Council. The Trinidad and Tobago Constitution of 1962 in Schedule 2 to the Trinidad and Tobago (Constitution) Order in Council 1962 (S.I. 1962 No. 1875) required the minister to consult with the Advisory Committee of which he was a member and chairman but he was not required to follow its advice (1962 Constitution section 72(3)). This is a consultative body with no decision-making power.

In The Bahamas the power of commuting rests with the Governor-General on behalf of Her Majesty. He must act in accordance with the advice of the designated Minister (article 90(2)) who in turn must consult with the Committee though he is not required to act in accordance with the Committee's advice (article 92(3)). Thus it was the personal character of the discretion which influenced the Board in *Reckley No. 2* to reject an argument in favour of the court having power to exercise judicial review.

In Jamaica on the other hand it is said that the Governor-General acts on behalf of Her Majesty but he must act on the advice of the Jamaican Privy Council (section 90(2)). Accordingly the decision is not a personal one but is the collective and collegiate decision of the Jamaican Privy Council over which the Governor-General presides. Moreover, whereas in Trinidad and Tobago and The Bahamas it is for the Minister to decide what further information should be provided, in Jamaica the Governor-General must act on the recommendation of the Jamaican Privy Council itself (section 91(2)). The role of the Jamaican Privy Council is wider than that of the Advisory Committee in the other two countries since it is not limited as they are to giving advice in relation to the prerogative of mercy. The Privy Council of Jamaica has other functions in respect of which there is no reason why it should not be subject to judicial review.

These differences have been forcefully put before the Board but without going so far as to say that the argument that these differences distinguish the present case from the decisions in *de Freitas v. Benny* and *Reckley No. 2* are "untenable" (as Downer J.A. considered in the case of Patrick Taylor, McLeod and Brown at page 31 of the transcript), their Lordships do not consider that the differences justify a distinction being drawn in this regard between the three countries. The position in each with respect to the right to make representations on a mercy petition should be the same. Their Lordships are accordingly compelled to consider whether they should follow these two cases. They should do so unless they are satisfied that the principle laid down was wrong – not least since the opinion in *Reckley No. 2* was given as recently as 1996. The need for legal certainty demands that they should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so. But no less should they be prepared to do so when a man's life is at stake, where the death penalty is involved, if they are satisfied that the earlier cases adopted a wrong approach. In such a case rigid adherence to a rule of *stare decisis* is not justified. See e.g. *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74 at page 125D-H per Lord Bridge of Harwich; *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740 at 754F per Taylor L.J. and *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1 itself, the latter being a striking example of the Board reversing a previous but recent decision; see also the comments of Lord Bingham of Cornhill C.J. in *Reg. v. Governor of Brockhill Prison, Ex parte Evans* [1997] Q.B. 443 at p. 462, a case in which the Divisional Court held to be wrong the statutory interpretation adopted in other recent cases by that Court.

It is to their Lordships plain that the ultimate decision as to whether there should be commutation or pardon, the exercise of mercy, is for the Governor-General acting on the recommendations of the Jamaican Privy Council. The merits are not for the courts to review. It does not at all follow that the whole process is beyond review by the courts. Indeed it was accepted both by Lord Diplock in *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342, at p. 1346 and by Lord Goff of Chieveley in *Reckley No. 2* at page 539C-E that there is a right to have a petition for mercy considered by the Advisory Committee. The same must be true of the Jamaican Privy Council. There could in their Lordships' view be no justification for excluding review by the courts if it could be shown that the Governor-General proposed to reject a petition without consulting the Jamaican Privy Council, that the Governor-General refused to require information recommended to be obtained by the Jamaican Privy Council or that the Governor-General having required the information to be obtained, the Privy Council indicated that it

refused to look at it. The same would be the position if it could be shown that persons not qualified to sit on the Jamaican Privy Council or who were not members of the Jamaican Privy Council had purported to participate in one of the recommendations of the Jamaican Privy Council.

The fact that section 91 of the Constitution requires the Jamaican Privy Council to have the judge's report and such other information as the Governor-General, on the Jamaican Privy Council's recommendation, requires does not mean that the Jamaican Privy Council is precluded from looking at other material even if the right to have such material before the Jamaican Privy Council must be based on some other rule than the express provisions of the Constitution.

Whatever the practice of the Home Secretary in England and Wales and before the death penalty was abolished in 1965, the insistence of the courts on the observance of the rules of natural justice, of "fair play in action", has in recent years been marked even before, but particularly since, decisions like *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 (see e.g. *Lloyd v. McMahon* [1987] A.C. 625 at pages 702-703; *Reg. v. Secretary of State for the Home Department, Ex parte Fayed* [1998] 1 W.L.R. 763) though the long citation of authority for such a self-evident statement is not necessary.

On the face of it there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and comment on the other material which is before that body. This is the last chance and insofar as it is possible to ensure that proper procedural standards are maintained that should be done. Material may be put before the body by persons palpably biased against the convicted man or which is demonstrably false or which is genuinely mistaken but capable of correction. Information may be available which by error of counsel or honest forgetfulness by the condemned man has not been brought out before. Similarly if it is said that the opinion of the Jamaican Privy Council is taken in an arbitrary or perverse way – on the throw of a dice or on the basis of a convicted man's hairstyle – or is otherwise arrived at in an improper, unreasonable way, the court should *prima facie* be able to investigate.

Are there special reasons why this should not be so?

In *Reckley No. 2* much importance was attached to the composition of the Advisory Committee on the Prerogative of Mercy. The experience, status, independence of the members is no doubt an important feature of the process. It provides a valuable protection

and prevents the autocratic rejection of a petition by one person. Their Lordships do not however accept that this is a conclusive reason why judicial review should be excluded. They may unconsciously be biased, there may still be inadvertently a gross breach of fairness in the way the proceedings are conducted. In *In re John Rivas' Application for Judicial Review* unreported, 2nd October 1992, Supreme Court of Belize, Singh J. said at pages 12-13:-

> "The Solicitor-General also submitted that such 'august', 'unique' and 'powerful' institution as the Belize Advisory Council, should not be liable to have its decisions subject to the supervisory jurisdiction of the Supreme Court. With respect, I disagree. Unique or not, any institution, be it inferior court or superior tribunal, which deals with the legal and human rights of any subject, in any capacity whatsoever, must conform to the time-honoured and hallowed principles of fundamental rights and natural justice. Any allegation that there has been a breach of any of these principles in relation to any person must, in my view, be subject to inquiry by the Supreme Court, irrespective of the calibre of the institution in respect of which the allegation has been made."

See also *Reg. v. Lord Saville of Newdigate, Ex parte A* [1999] 4 All E.R. 860 at page 870E-G.

Although on the merits there is no legal right to mercy there is not the clear cut distinction as to procedural matters between mercy and legal rights which Lord Diplock's aphorism that mercy begins where legal rights end might indicate.

Is the fact that an exercise of the prerogative is involved *per se* a conclusive reason for excluding judicial review? Plainly not. Although in some areas the exercise of the prerogative may be beyond review, such as treaty- making and declaring war, there are many areas in which the exercise of the prerogative is subject to judicial review. Some are a long way from the present case, but *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349, though it does not raise the same issue as in the present case, is an example of the questioning of the exercise of the prerogative in an area which is not so far distant. As the Divisional Court said at page 363:-

> "If, for example, it was clear that the Home

> Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so."

See also *Attorney-General of Trinidad and Tobago v. Phillip* [1995] 1 A.C. 396 and the discussion in *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672 per Cooke P. at pages 678-681; *Lauriano v. Attorney-General of Belize* (unreported), 20th September 1995 (Supreme Court) and 17th October 1995 (Court of Appeal). In *Yassin v. Attorney-General of Guyana* (unreported), 30th August 1996 Fitzpatrick J.A. said at p. 24:-

> "In this case justiciability concerning the exercise of the prerogative of mercy applies not to the decision itself but to the manner in which it is reached. It does not involve telling the Head of State whether or not to commute. And where the principles of natural justice are not observed in the course of the processes leading to its exercise, which processes are laid down by the Constitution, surely the court has a duty to intervene, as the manner in which it is exercised may pollute the decision itself."

Does the fact that this particular exercise of the prerogative is involved mean that judicial review must be excluded? In *Reckley No. 2* much stress is placed on the personal nature of the power conferred but despite this in their Lordships' view the act of clemency is to be seen as part of the whole constitutional process of conviction, sentence and the carrying out of the sentence. In *Burt* [1992] 3 N.Z.L.R. 672 although in that case it was not found necessary to extend the scope for judicial review the court accepted at p. 683 that:-

> "... it is inevitably the duty of the court to extend the scope of common law review if justice so requires ..."

Cooke P. said at page 681:-

> "For these reasons the claim that the Courts should be prepared to review a refusal to exercise the prerogative of mercy, at least to the extent of ensuring that elementary standards of fair procedure have been followed, cannot by any means be brushed

> aside as absurd, extreme or contrary to principle. For example, it is obvious that allegations in a petition, unless patently wrong, should be adequately and independently investigated by someone not associated with the prosecution: the court could at least check that this has happened."

This approach seems to their Lordships to be in line with what was said by Holmes J. in *Biddle v. Perovich* (1927) 274 U.S. 480, 486:-

> "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."

The fact that the matters to be taken into account on the merits of the application for mercy go beyond, or are different from those relevant to, guilt or sentence does not lead to the conclusion that judicial review of the procedure is excluded.

Sir Godfray Le Quesne Q.C. on behalf of the interveners forcefully stressed that the process of clemency is unique. It amounts to a power to dispense with the normal application of the law – that is to carry out the prescribed death penalty – and it involves an exceptional breadth of discretion. These submissions are no doubt correct but in their Lordships' view they are not inconsistent with a court insuring that proper procedures are followed nor are they inconsistent with the Privy Council of Jamaica being required to look at what the condemned man has to say any more than they are in principle inconsistent with a duty to consider the judge's report. One is prescribed by statute the other is not. The question is whether the common law requires that other material than the judge's report be looked at.

The importance of the consideration of a petition for mercy being conducted in a fair and proper way is underlined by the fact that the penalty is automatic in capital cases. The sentencing judge has no discretion, whereas the circumstances in which murders are committed vary greatly. Even without reference to international conventions it is clear that the process of clemency allows the fixed penalty to be dispensed with and the punishment modified in order to deal with the facts of a particular case so as to provide an acceptable and just result. But in addition Jamaica ratified the American Convention on Human Rights 1969 on 7th August 1978

and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state's obligation under such a treaty (*Matadeen v. Pointu* [1999] 1 A.C. 98, 114G-H).

Article 4 of the American Convention on Human Rights 1969 provides for the right to life. By paragraph 6:-

> "Every person condemned to death shall have the right to apply for amnesty, pardon or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

As to Article 4 of the American Convention the Inter-American Court in paragraph 55 of its Advisory Opinion OC – 3/83 (Restrictions to the Death Penalty) 8 September 1983 has said:-

> "Thus, three types of limitations can be seen to be applicable to states parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account".

Whether or not the provisions of the Convention are enforceable as such in domestic courts, it seems to their Lordships that the States' obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review.

The procedures followed in the process of considering a man's petition are thus in their Lordships' view open to judicial review. In their Lordships' opinion it is necessary that the condemned man should be given notice of the date when the Jamaican Privy Council will consider his case. That notice should be adequate for him or his advisers to prepare representations before a decision is taken. It is not sufficient, as has happened in Patrick Taylor's case, for him to be asked to submit a petition after they had met and when either a decision had been taken, subject to revision, or a clear opinion or consensus formed. The fact that the Jamaican

Privy Council is required to look at the representations of the condemned man does not mean that they are bound to accept them. They are bound to consider them. There is every reason to have a confident expectation that the Jamaican Privy Council will behave fairly but if they do not the court can say so. The fact that the man has a right to make representations as a matter of fairness does not, contrary to what has been said, necessarily open the floodgates to challenges before the court or to further delay.

When the report of the international human rights bodies is available that should be considered and if the Jamaican Privy Council do not accept it they should explain why. Whether they are bound to wait for the report of the international human rights body is a question to be considered separately. It is in their Lordships' view not sufficient that the man be given a summary or the gist of the material available to the Jamaican Privy Council; there are too many opportunities for misunderstanding or omissions. He should normally be given in a situation like the present the documents. Their Lordships attach importance to what was said in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531 at page 563F-H:-

> "It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy Council in *Kanda v. Government of Malaya* [1962] A.C. 322, 337 is often quoted to this effect. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject. Rather, I would simply ask whether a life prisoner whose future depends vitally on the decision of the Home Secretary as to the penal element and who has a right to make representations upon it should know what factors the Home Secretary will take into account. In my view he does possess this right, for without it there is a risk that some supposed fact which he could controvert, some opinion which he could challenge, some policy which he could

argue against, might wrongly go unanswered."

Their Lordships have so far dealt with this matter on the basis that there is a right to put in "representations". These should normally be in writing unless the Jamaican Privy Council adopts a practice of oral hearing and their Lordships are not satisfied that there was any need for, or right to, an oral hearing in any of the present cases.

There was, however, in each of the present cases a breach of the rules of fairness, of natural justice, which means that the appellants did not enjoy the "protection of the law" either within the meaning of section 13 of the Constitution or at common law. In considering what natural justice requires, it is relevant to have regard to international human rights norms set out in treaties to which the state is a party whether or not those are independently enforceable in domestic law.

Petitions to International Human Rights bodies

Jamaica has allowed those sentenced to death to petition the Inter-American Commission and the United Nations Committee and the Jamaican Privy Council and to consider the recommendations of those bodies before deciding whether the prerogative of mercy should be exercised. It is to be noticed that in the case of Christopher Brown the Court of Appeal granted a stay of execution "pending the determination of his case before the United Nations Human Rights Committee and the Governor-General in Privy Council" in addition to the stay to cover proceedings before their Lordships' Board. This seems to their Lordships to be in accordance with their international obligations. The question arises as to whether in addition to its international obligations the state can be obliged at the behest of a condemned man to await the decision of one or other of the international human rights bodies. If this decision is arrived at speedily, or even within the 18 months referred to in *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1, then there is no problem. The difficulty arises when, as currently happens, these bodies take far longer to arrive at a decision. The dilemma is obvious. The human rights bodies meet infrequently and are undermanned so that as things stand delays are almost inevitable. The state is entitled, if it so chooses, to retain the death penalty but it must carry it out within five years after the conviction and sentence (*Pratt v. Attorney-General for Jamaica*). In *Bradshaw v. Attorney-General of Barbados* [1995] 1 W.L.R. 936 the Board rejected suggestions that:-

"... either the periods of time relating to

> (a) a communication has been received by the government as to the outcome of the prisoner's application, the Government of Jamaica shall advise the Clerk of the Privy Council of the outcome of the application. The matter shall then be considered by the Privy Council who shall advise the Governor-General. Unless the prerogative of mercy is exercised in favour of the prisoner, the execution will not be further postponed;
>
> (b) no such communication has been received, the execution will not be further postponed."

The Supreme Court in the case of Lewis considered that there could be no legitimate expectation after the making of these instructions that Jamaica would await the response of the Inter-American Commission before execution and that to proceed with the execution in view of the inordinate delay was not unreasonable.

The Court of Appeal on the other hand said that the first ground before it was "whether the appellant has a constitutional right to have his petition before the Commission, dealt with and any recommendation it may make to the State, considered, before the carrying out of the sentence of death upon him".

Forte J.A. referred to the judgment in *Thomas v. Baptiste* [1999] 3 W.L.R. 249 where Lord Millett said at page 259:-

> "In their Lordships' view 'due process of law' [referred to in section 4(a) of the Constitution of Trinidad and Tobago] is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of

> applications to the human rights bodies should be excluded from the computation of delay or the period of five years should be increased to take account of delays normally involved in the disposal of such complaints." (p. 941E).

It added:-

> "The acceptance of international conventions on human rights has been an important development since the Second World War and where a right of individual petition has been granted, the time taken to process it cannot possibly be excluded from the overall computation of time between sentence and intended execution." (p. 941H).

Jamaica's dissatisfaction with the delays is readily understandable and it is obviously desirable that states concerned in dealing with these international petitions should press for a more efficient and speedier system to be set up, at the very least that there should be a fast track for cases for persons under sentence of death. That has not yet happened and as early as 6th August 1997 the Governor-General gave his instructions as to how cases should proceed. In particular:-

> "Whereas, the Government of Jamaica has resolved [that] those applications to the International Human Rights Bodies by or on behalf of Prisoners under sentence of death must be conducted in as expeditious a manner as possible. ...
>
> 6. Where, after a period of six months, beginning on the date of despatch of such response, no recommendation has been received from the first International Human Rights body, the execution will not be further postponed unless intimation in writing is received by the Governor-General from the prisoner or on his behalf that he intends to make an application to the second International Human Rights body.
>
> 10. Where within the period of six months after the response to the second International Human Rights body by the Government of Jamaica –

> law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law ... The clause thus gives constitutional protection to the concept of procedural fairness."

Lord Millett added at page 261:-

> "The due process clause must therefore be broadly interpreted. It does not guarantee the particular forms of legal procedure existing when the Constitution came into force; the content of the clause is not immutably fixed at that date. But the right to be allowed to complete a current appellate or other legal process without having it rendered nugatory by executive action before it is completed is part of the fundamental concept of due process."

Forte J.A. continued:-

> "In respect of all the rights and freedoms guaranteed by Chapter III of the Constitution, the redress offered by its very provisions is founded on the right to the 'protection of the law'. The words therefore like 'the due process' clause, speak to the right to involve the judicial processes to secure the rights and freedoms declared in the Constitution. So in spite of Section 20 which deal with litigious matters i.e. criminal charges, and civil disputes, the citizen has the right to seek the assistance of the court in circumstances, where his constitutional rights and freedoms have been, are/or likely to be breached. In my view the protection of law, gives to the citizens the very right to the due process of law that is specifically declared in Section 4(a) of the Trinidad and Tobago Constitution. You cannot have protection of the law, unless you enjoy 'due process of the law' – and if protection of law does not involve a right to the due process of the law, then a provision for protection of the law, would be of no effect. In my opinion the two terms are synonymous, and consequently as in Trinidad and Tobago the people of Jamaica through the 'protection of law' guarantee in Section 13 of

> the Jamaica Constitution are endowed with 'constitutional protection to the concept of procedural fairness' [see the case of *Thomas v. Baptiste*]."

The difference between Trinidad and Tobago and Jamaica was that the latter had not, whereas the former had, accepted the jurisdiction of the Inter-American court. Jamaica had only accepted the jurisdiction of the Commission which makes a non-binding report to the Governor-General.

Forte J.A. continued:-

> "However, I would hold the appellant enjoys the 'protection of law' which would give the appellant a constitutional right to procedural fairness. Although decisions of the Governor General in the exercise of Prerogative of Mercy are not justiciable, nevertheless the Courts can in accordance with the procedural fairness guaranteed by the Constitution, require the Governor General to consider matters that by virtue of the law and the Constitution, he is mandated to consider in coming to his decision. In those circumstances even though the recommendation of the Commission are not binding on the Governor General in the exercise of the Prerogative of Mercy, given the terms of the Treaty which the Government ratified, the Privy Council ought to await the result of the petition, so as to be able to give it consideration in determining whether to exercise the Prerogative of Mercy."

Further, on the basis of the Board's decision in *Thomas v. Baptiste* the Court of Appeal held that since the regulations of the Inter-American Commission required a maximum of 510 days to complete the process, for the Governor-General to require the Inter-American Commission to complete its process in six months was disproportionate and unlawful. Forte J.A. drew attention to the "ironic" result that since the Commission would not proceed until domestic remedies have been exhausted Lewis' case was not being processed.

Downer J.A. held that to limit the time to six months when *Pratt* recognised a period of almost 18 months was beyond the powers of the Governor-General and his instructions were invalid. Langrin

J.A. referred to the Governor-General's submission that:-

> "The Government of Jamaica has the responsibility of maintaining public confidence in the system of criminal justice and as a consequence is obliged to take appropriate measures to ensure that the International Appellate processes did not prevent the lawful sentences of courts to be carried out. This latter submission is not acceptable ... I am of the view that the expressed words in section 13 inferred the justiciable right of procedural fairness."

The Attorney-General challenges these conclusions in his cross-appeal in Lewis and is supported by the Interveners. His overriding contention is that the Convention has not been incorporated into domestic law: it is therefore not part of domestic law and no enforceable rights can arise under it. There is no ambiguity and "the legality of an execution, as a matter of domestic law, could not be affected by the terms of an international treaty not incorporated into domestic law" (respondents' case, para. 26B(v)).

Some of the interveners contend that the Court of Appeal's decision that there is a right to complete "international appellate process" is inconsistent with *Fisher v. Minister of Public Safety and Immigration (No. 2)* [2000] 1 A.C. 434 and *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368 and is an unwarranted extension of *Thomas v. Baptiste* [1999] 3 W.L.R. 249.

Much attention has been directed in argument to these three judgments of the Board. In *Fisher v. Minister of Public Safety and Immigration (No. 2)* [2000] 1 A.C. 434 the majority held that the provisions of article 16 of The Bahamas Constitution did not expressly provide that a person had a right to life pending a determination of a petition to the Inter-American Commission and that no such right was to be implied since The Bahamas was not a member of the Organisation of American States at the time the Constitution was adopted. Moreover since legitimate expectations did not create rules of law the government could act inconsistently with those expectations so long as it gave those affected an opportunity to put their case. Since the appellant was given notice that the government would not wait beyond the fixed date for the Commission to report they could no longer have a legitimate expectation that the government would wait for that report. The government had in all the circumstances of that case acted reasonably.

In *Thomas v. Baptiste* [1999] 3 W.L.R. 249 the majority held that the time limits fixed by the Government were unlawful because they were disproportionate, though it was reasonable to provide some time limit within which the international appellate processes should be completed. The majority again stressed the constitutional importance of the principle that international conventions do not alter domestic law unless they are incorporated into domestic law by legislation. The majority continued at pages 260-261:-

> "In their Lordships' view, however, the applicants' claim does not infringe the principle which the government invoke. The right for which they contend is not the particular right to petition the commission or even to complete the particular process which they initiated when they lodged their petitions. It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4(a) of the Constitution. The applicants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution."

They said that this argument had been rejected in *Fisher No. 2* but considered that the Constitution of The Bahamas did not include a due process clause similar to that contained in section 4(a) of the Constitution of Trinidad and Tobago from which this case came.

In *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368 the Board stressed that domestic courts have no jurisdiction to construe or apply a treaty and that unincorporated treaties have no effect upon the rights and duties of citizens at common law or by statute.

They continued at page 1375:-

> "They may have an indirect effect upon the

> construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations. Or the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty."

The Board accepted that there was no difficulty in implying that an execution should be carried out with regard to the due process of the law and general principles of fairness. They added at page 1379:-

> "But the majority of the Board in *Thomas's* case [1999] 3 W.L.R. 249 clearly did not regard this common law concept as having the power (absent specific language in the Constitution) to incorporate procedures having an existence only under international law into the domestic criminal justice system. It is not for their Lordships to say whether this was right or wrong."

They thought however that *Fisher No. 2* should be followed.

It is of course well established that a ratified but "unincorporated treaty", though it creates obligations for the state under international law, does not in the ordinary way create rights for individuals enforceable in domestic courts and this was the principle applied in *Fisher No. 2*. But even assuming that that applies to international treaties dealing with human rights, that is not the end of the matter. Their Lordships agree with the Court of Appeal in Lewis that "the protection of the law" covers the same ground as an entitlement to "due process". Such protection is recognised in Jamaica by section 13 of the Constitution and is to be found in the common law.

Their Lordships do not consider that it is right to distinguish between a Constitution which does not have a reference to "due process of law" but does have a reference to "the protection of the law". They therefore consider that what is said in *Thomas v. Baptiste* to which they have referred is to be applied *mutatis mutandis* to the Constitution like the one in Jamaica which provides for the protection of the law. In their Lordships' view when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision in section 13 to complete the human rights petition procedure and

to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of the execution until those reports had been received and considered. Now that Jamaica has withdrawn from the Optional Protocol to the United Nations International Covenant only one petition will be allowed and it should be possible for the Inter-American Commission to deal with, and they should make every effort to deal with, the petitions within a period in the region of 18 months. The expectation expressed in *Pratt* that the petition could be dealt with within 18 months may, from what the Board has seen in subsequent cases, have been over-optimistic particularly where two petitions were allowed. It may be that a few months over the 18 months will have to be accepted (see *Thomas v. Baptiste*) though the shorter the domestic proceedings the more time will be left for the international petition to be dealt with in the five year period. In any event their Lordships see no justification to alter the period of five years referred to in *Pratt*. Accordingly their Lordships are of the view that the time limits imposed by the Governor-General in his instructions of 6th August 1997 violated the rules of natural justice and were unlawful. Execution consequent upon the Jamaican Privy Council's decision without consideration of the Inter-American Commission report would be unlawful.

Prison conditions

All the appellants contend that their treatment in prison and the prison conditions in which they were detained amount to inhuman or degrading treatment so that it would be inappropriate to execute them. By way of illustration Desmond Taylor alleges that he was beaten, that he was denied adequate access to a doctor. Shaw says that he was beaten and shackled. Brown says that he was beaten, then his asthma inhaler was destroyed and he was refused adequate medical treatment. Patrick Taylor says that he was beaten and kept in handcuffs. He was frightened by beatings inflicted by wardens and other prisoners. He had to eat and drink from plastic bags because he had no utensils from which to eat. McLeod said that he was beaten and denied medical attention. Most of the allegations made are denied by the respondents and affidavit evidence was available to the Supreme Court and to the Court of Appeal.

The Court of Appeal in Patrick Taylor and McLeod and Brown set out affidavit evidence on both sides. In the case of Taylor Downer J.A. held that the facts even if true could not be a basis for delaying the execution. In respect of McLeod he considered that some of the complaints even if true could not justify him staying the warrant of execution, others were unlikely to be true. Panton J.A. (Ag.) held in respect of Taylor that "the prison conditions as alleged do not present any matter for argument to secure a

commutation of the sentence of death" (transcript page 68).

In Lewis' case it seems that the contention that the conditions of incarceration amounted to inhuman and degrading treatment was not argued in the Court of Appeal (see the judgment of Langrin J.A.) though the matter was investigated on the basis of affidavits in the Supreme Court. The allegations were not accepted. Wolfe C.J. preferred the affidavit evidence put in by the Attorney-General and said "I am satisfied that the conditions which exist do not constitute inhuman and degrading treatment". Cooke J. rejected the affidavit evidence:-

> "There is a palpable lack of sincerity on the part of the plaintiff in his fruitless endeavour to establish that he was a victim of 'inhuman and degrading treatment'."

Harrison J. after a very detailed analysis of all the evidence concluded that Lewis' credibility "has indeed been shattered ... I accept the evidence presented on behalf of the defendants. Albeit conditions in the prisons are not fully satisfactory, they do not amount in my view to inhuman and degrading forms of treatment and/or punishment".

Despite the fuller examination of the evidence in the Court of Appeal judgment in Lewis' case their Lordships conclude that the result is the same as in the other cases. There was as Cooke J. said no cross-examination and no "opportunity of any assessment based on a view of the demeanour of the persons who presented affidavits". It was also necessary for the court to take into account the mental suffering when three death warrants were read to Lewis and he was moved to the gallows block with all that entails. It was also necessary to bear in mind that the warrants were read before he had exhausted his domestic and international remedies and the January 1999 warrant was read despite a letter from his lawyer to the Governor-General showing that it was intended to seek leave to appeal. Their Lordships are not satisfied that without a further investigation these matters were properly taken into account.

It is obviously impossible for the Board to resolve the conflict as to what happened in the prison in these six cases. Their Lordships are however disturbed by the fact that these issues were decided on affidavit evidence without any investigation of the allegations in depth or challenge to the affidavit evidence. There are no findings of fact on the various allegations.

Accordingly whilst they are not prepared to say that these allegations are such that there was a violation of section 17 of the Constitution they consider that these are serious matters which

ought to have been investigated. Had it been necessary to do so (which in view of their decision on the other matters raised it is not) they would have required these allegations to be investigated to see whether (a) they were made out and (b) whether they were such as to aggravate the punishment of the death sentence so as to amount to inhuman and degrading treatment in the light of the Board's judgment in *Higgs v. Minister of National Security* and *Thomas v. Baptiste* (*supra*).

However for the reasons which they have given their Lordships will humbly advise Her Majesty that the appeals in all of the six cases should be allowed and that the cross-appeal in the case of Lewis should be dismissed.

Delay

It appears from the chronology that the periods of delay since initial conviction and sentence until August 2000 were:-

Neville Lewis convicted 14th October 1994 5 years 10 months

Patrick Taylor convicted 25th July 1994 6 years 1 month

Anthony convicted 22nd September 4 years

McLeod 1995 11 months

Christopher first convicted 28th October 6 years

Brown 1993 10 months conviction set aside 18th July 1994 second conviction 23rd 4 years 6 February 1996 months (but under sentence of death 3 months on the first conviction) making a total of 4 years 8 months

Desmond Taylor convicted 25th July 1994 6 years 1 month

Steve Shaw convicted 25th July 1994 6 years 1 month

Thus in four of the cases the period of five years referred to in *Pratt* has already elapsed. In McLeod's case four years and eleven months and in Brown's case four years and eight months in prison following sentences of death have elapsed but it is inevitable that, by the time the appellants' advisers have been able to see the material which was before the Privy Council of Jamaica and to make representations on it in the light of this opinion of the Board, the period of five years will have elapsed. In Brown's case the overall length of time from the first conviction would make it inhuman treatment now to execute him in any event.

Their Lordships are therefore satisfied that the sentences of death should be set aside in all cases and commuted to ones of life imprisonment. Their Lordships will humbly advise Her Majesty accordingly.

Dissenting judgment delivered by ***Lord Hoffmann***

These appeals concern the legality of the sentence of death which, in accordance with the law of Jamaica, has been passed upon six prisoners convicted of murder. The questions raised are of the utmost importance, not only for the prisoners whose lives are at stake but also for the administration of justice in Jamaica and the other Commonwealth countries of the Caribbean. The Board sits as a supreme court of appeal to enforce their laws and constitutions. It is of course obvious to the members of the Board that they must discharge that duty without regard to whether they personally favour the death penalty or not. But the wider public may need to be reminded.

There are three questions which arise. The first ("the Jamaican Privy Council issue") is whether the Jamaican Privy Council, before deciding whether or not to recommend to the Governor-General that a sentence of death be commuted, is required to disclose to the prisoner the information which it has received pursuant to section 91 of the Constitution. The second ("the Inter-American Commission issue") is whether it would be unlawful to execute a sentence of death while the prisoner's petition remained under consideration by the Inter-American Commission on Human Rights. The third ("the prison conditions issue") is whether the execution of the sentence of death can be unlawful because the prisoner, while in detention, has been subjected to treatment which is unlawful or unconstitutional but unrelated to his being under sentence of death.

All three of these questions have been considered and answered in recent decisions of the Board. The Jamaican Privy Council issue was decided in the negative in *Reckley v. Minister of Public Safety and Immigration No. 2* [1996] A.C. 527, when the Board decided not to depart from its earlier decision in *de Freitas v. Benny* [1976] A.C. 239. The Inter-American Commission issue was decided in the negative in *Fisher v. Minister of Public Safety and Immigration No. 2* [2000] 1 A.C. 434 and most recently in *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368. The prison conditions issue was decided in the negative in *Thomas v. Baptiste* [1999] 3 W.L.R. 249 and in *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368.

The Board now proposes to depart from its recent decisions on all three points. I do not think that there is any justification for doing so. It was appropriate in *Reckley v. Minister of Public Safety and Immigration No. 2* [1996] A.C. 527 for the Board to review its previous decision in *de Freitas v. Benny* [1976] A.C. 239. Twenty years had passed, during which there had been important developments in administrative law. In particular, the notion once entertained that an exercise of the prerogative was, as such, immune from judicial review had been repudiated by the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374. It was arguable that the reluctance of the courts to impose a general rule of *audi alterem partem* upon the exercise of the prerogative of mercy was a mere relic of outdated theory. But the Board decided in *Reckley No. 2* that there were still, in modern conditions, strong enough grounds for maintaining the old rule. In *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672 Cooke P. similarly decided that although there were no conceptual obstacles to requiring the Governor-General to observe the principle of *audi alterem partem* in exercising the prerogative of mercy, pragmatic considerations in New Zealand pointed the other way. The Board in *Reckley No. 2* took the same view of conditions in the Caribbean in 1996. Nothing has happened since then which could justify revisiting the decision not to depart from *de Freitas v. Benny* [1976] A.C. 239.

On the Inter-American Commission issue, the majority have found in the ancient concept of due process of law a philosopher's stone, undetected by generations of judges, which can convert the base metal of executive action into the gold of legislative power. It does not however explain how the trick is done. *Fisher v. Minister of Public Safety and Immigration (No. 2)* [2000] 1 A.C. 434 and *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368 are overruled but the arguments stated succinctly in the former and more elaborately in the latter are brushed aside rather than confronted. In particular, there is no explanation of how, in the domestic law of Jamaica, the proceedings before the Commission constitute a legal process (as opposed to the proceedings of any other non-governmental body) which must be duly completed. Nor can there be any question of the prisoners having had a legitimate expectation (as the term is now understood in administrative law) that the State would await a response to their petitions. All the petitions were presented after the Government had issued the Instructions and a legitimate expectation can hardly arise in the face of a clear existing contrary statement of policy. In *Thomas v. Baptiste* [1999] 3 W.L.R. 249, 262-263 an argument based upon legitimate expectation was summarily rejected.

Finally, on the prison conditions issue, reference is made to *Thomas v. Baptiste* [1999] 3 W.L.R. 249 and *Higgs v. Minister of*

National Security [2000] 2 W.L.R. 1368, but nothing is said about the principle laid down in those cases that an execution does not become a cruel or unusual punishment because the prisoner's constitutional rights have been infringed in ways unrelated to the infliction of that punishment. The courts in Jamaica loyally applied this principle and decided that on this ground the complaints of prison conditions, even if entirely true, would not affect the legality of the executions. But the courts in Jamaica are told that all the allegations ought nevertheless to have been investigated and findings of fact made. They are given little guidance on what to do with such findings. They are told to consider whether they would aggravate the infliction of the death sentence so "as to amount to inhuman and degrading treatment in the light of the Board's judgment in *Higgs v. Minister of National Security* and *Thomas v. Baptiste*". But there is no explanation of why the Court of Appeal was wrong in deciding that in the light of these cases, the truth of the complaints did not require investigation. The majority opinion places no limits upon the matters which must be taken into consideration and proceeds on the basis that the minority opinions in *Higgs v. Minister of National Security* and *Thomas v. Baptiste* represent the law.

I entirely accept that the Board is not, as a matter of law, bound by its previous decisions. And I respect the conviction of the majority that this is an occasion to exercise the Board's power to overrule the earlier cases. But I think it is a mistake. The fact that the Board has the power to depart from earlier decisions does not mean that there are no principles which should guide it in deciding whether to do so.

Some assistance can be obtained from the practice of the Supreme Court of the United States. That court has never considered itself rigidly bound by precedent. In *Brown v. Board of Education of Topeka* 347 U.S. 483, (1953) it famously overruled its previous decision that racial segregation was lawful. But in *Planned Parenthood of Southeastern Pennsylvania. v. Casey* (1992) 505 U.S. 833, the Court discussed the grounds upon which it would depart from precedent and why it would not overrule its equally controversial decision on abortion in *Roe v. Wade* (1973) 410 U.S. 113. Justices O'Connor, Kennedy and Souter J.J., speaking for the court, said at p. 854:-

> "no judicial system could do society's work if it eyed each issue afresh in every case that raised it. ... Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."

The judgment of the court in deciding whether to overrule a previous decision was "customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law", such as whether the previous rule is intolerable because not in practice workable, or whether at p. 855, related principles of law have developed "as to have left the old rule no more than a remnant of abandoned doctrine", or whether facts have changed "or come to be seen so differently, as to have robbed the old rule of significant application or justification". In the absence of such grounds, p. 864:-

> "the Court could not pretend to be reexamining the prior law with any justification beyond a doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest some special reason over and above the belief that a prior case was wrongly decided."

The opinion went on to cite Stewart J. in *Mitchell v. W.T. Grant Co.* (1974) 416 U.S. 600, 636:-

> "A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."

Stewart J.'s reference to changes in the membership of the court prompts another reason why it is particularly important for this Board to be very careful in departing from precedent. The fact that the Supreme Court of the United States sits in *banc* means that, subject to infrequent changes in membership, there is a natural continuity in its views. But the Board hearing an appeal consists of five members drawn from the twelve Law Lords, occasional visiting judges from Commonwealth countries (though regrettably seldom from the Caribbean) and a number of retired Lords Justices of Appeal. It is possible for a Board to be constituted without anyone who was party to a recent governing precedent or to be composed largely of members who were previously in dissenting minorities.

Macaulay said of the constitution of the United States that it was "all sail and no anchor". I think that history has proved him wrong. But the power of final interpretation of a constitution must be handled with care. If the Board feels able to depart from a previous decision simply because its members on a given occasion have a "doctrinal disposition to come out differently", the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.

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